IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-599

SECRETARY OF THE NAVY, et al.,

Petitioners,

v.

FRANK L. HUFF, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

ALAN DRANITZKE
Rein, Garfinkle & Dranitzke
1712 N Street, N.W.
Washington, D.C. 20036

DAVID ADDLESTONE
National Veterans Law Center
Washington College of Law
American University
Washington, D.C. 20016

Attorneys for Respondents

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-599

SECRETARY OF THE NAVY, et al.,

Petitioners,

v.

FRANK L. HUFF, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

QUESTION PRESENTED

Whether Navy and Marine Corps regulations that require military personnel located at a foreign duty station to obtain approval before circulating on the base petitions to members of Congress are invalid under 10 U.S. Code § 1034.

CONSTITUTIONAL PROVISION, STATUTE, AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

10 U.S. Code §1034 provides:

> "No person may restrict any member of the armed forces in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States."

Department of Defense (DOD) Directive (1325.6) (1969) provides in relevant part:

> "I. PURPOSE AND APPLICABILITY
>
> This Directive provides general guidance governing the handling of dissident activities by members on active duty of the Army, Navy, Air Force, and Marine Corps. Specific problems can, of course, be resolved only on the basis of the particular facts of the situation and in accordance with the provisions of applicable Department regulations and the Uniform Code of Military Justice.
>
> III. SPECIFIC GUIDELINES
>
> The following Guidelines relate to principal activities in this area which the Armed Forces have encountered:
>
> G. *Grievances.* The right of members to complain and request redress of grievances against actions of their commanders is protected under Article 138 of the Uniform Code of Military Justice. In addition, a member may petition or present any grievance to any member of Congress (10 U.S.C. 1034). An open door policy for complaints is a basic principle of good leadership, and Commanders should personally assure themselves that adequate procedures exist for identifying valid complaints and taking corrective action.

Enclosure 1

CONSTITUTIONAL AND STATUTORY PROVISIONS RELEVANT TO HANDLING OF DISSIDENT AND PROTEST ACTIVITIES IN THE ARMED FORCES

A. *Constitution*: The First Amendment, U.S. Constitution, provides as follows:

> 'Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'

B. *Statutory Provisions:*

1. *Applicable to All Persons*
   a. 18 U.S.C. §1381 – Enticing desertion.
   b. 18 U.S.C. §2385 – Advocating overthrow of the Government.
   c. 18 U.S.C. §2387 – Counselling of insubordination, disloyalty, mutiny, or refusal of duty.
   d. 18 U.S.C. §2388 – Causing or attempting to cause insubordination.
   e. 50 U.S.C. App. §462 – Counselling evasion of the draft.

2. *Applicable to Members of the Armed Forces*

a. 10 U.S.C. §917 (Article 117, UCMJ) – Provoking speech or gestures.

b. 10 U.S.C. §882 (Article 82, UCMJ) – Soliciting desertion, mutiny, sedition, or misbehavior before the enemy.

c. 10 U.S.C. §904 (Article 104, UCMJ) – Communication or corresponding with the enemy.

d. 10 U.S.C. §901 (Article 101, UCMJ) – Betraying a countersign.

e. 10 U.S.C. §888 (Article 88, UCMJ) – Contemptuous words by commissioned officers against certain officials.

f. 10 U.S.C. §889 (Article 89, UCMJ) – Disrespect toward his superior commisioned officer.

g. 10 U.S.C. §891 (Article 91, UCMJ) – Disrespect toward a warrant officer or noncommissioned officer in the execution of his office.

h. 10 U.S.C. §892 (Article 92, UCMJ) – Failure to obey a lawful order or regulation.

i. 10 U.S.C. §934 (Article 134, UCMJ) – Uttering disloyal statement, criminal libel, communicating a threat, and soliciting another to commit an offense."

Department of Defense (DOD) Directive 1344.10 (1969) provides in relevant part:

"Enclosure 1

In accordance with the policies established in Sec. 4, a member on active duty may:

2.f. Sign a petition for specific legislative action or a petition to place a candidate's name on an official election ballot, provided the signing thereof does not obligate the member to engage in partisan political activity and is taken as a private citizen and not as a representative of the Armed Forces."

Fleet Marine Force Pacific Order (FMFO) 5370.3 (1974) provides in pertinent part:

"3.b. No Fleet Marine Force, Pacific or Marine Corps Bases, Pacific, personnel will originate, sign, distribute, or promulgate petitions, publications, including pamphlets, newspapers, magazines, handbills, flyers, or other printed or written material on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy, on any military installation on duty or in uniform, or anywhere within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained.

4.a. Commanding generals and commanding officers will control or prohibit the unauthorized activities described in subparagraphs 3a, 3b, and 3c above if, in their judgment, the activity would:

(1) Materially interfere with the safety, operation, command, or control of his unit or the assigned duties of particular members of the command; or

(2) Present a clear danger to the loyalty, discipline, morale, or safety to personnel of his command; or

(3) Involve distribution of material or the rendering of advice or counsel that causes, attempts to cause, or advocates insubordination, disloyalty, mutiny, refusal of duty, solicits deser-

tion, discloses classified information, or contains obscene or pornographic matter; or

(4) Involve the planning or perpetration of an unlawful act or acts."

STATEMENT

On January 10, 1975, three individuals filed suit in the United States District Court for the District of Columbia challenging certain United States Marine Corps and United States Navy Regulations, which limited their rights to originate, sign, distribute, and promulgate petitions and other written materials. (A. 5-24.) The three individuals, Private Frank L. Huff, Lance Corporal Robert A. Falantine, and Sergeant Robert E. Gabrielson, are United States citizens and were then members of the United States Marine Corps stationed at the Marine Corps Air Station, Iwakuni, Japan. They sued to restrain the defendants from denying them their rights under the First Amendment to the Constitution and to declare 1st Marine Aircraft Wing Order (MAWO) 5370.1A, Marine Corps Air Station (Iwakuni, Japan) Order (MCASO) 5370.3A, Fleet Marine Force Pacific Order (FMFO) 5370.3, and Commander-in-Chief, Pacific Fleet Instruction (CINCPACFLTINST) 5440.3C unconstitutional on their face and as applied. On March 13, 1975, the complaint was amended so as to be brought on behalf of all members of the Marine Corps stationed at, assigned to, or on duty at the Marine Corps Air Station, Iwakuni, Japan.[1] (A. 25-26.)

[1] On July 17, 1975, the case was certified as a class action "on behalf of all members of the Marine Corps stationed at, assigned to, or on duty at the Marine Corps Air Station at Iwakuni, Japan" on the issue of the validity of the challenged rules and regulations. *Huff v. Secretary of the Navy*, 413 F. Supp. 863, 864-65 (D.D.C. 1976).

The action was brought against the Secretary of the Navy, Commandant of the Marine Corps, Commander-in-Chief U.S. Pacific Fleet, Commanding General Fleet Marine Force Pacific, Commanding General 1st Marine Aircraft Wing, and Commanding Officer U.S. Marine Corps Air Station, who were the superior officers responsible for prescribing the rules and regulations and administering the rules and regulations in question. (A. 5-11.)

The regulations under attack read in pertinent part as follows:

> "No Fleet Marine Force, Pacific or Marine Corps Bases, Pacific, personnel will originate, sign, distribute, or promulgate petitions, publications, including pamphlets, newspapers, magazines, handbills, flyers, other printed or written materials, on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy, on any military installation on duty or in uniform, or anywhere within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained." FMFO 5370.3 §3.b.[2]

The specific facts which gave rise to the filing of this case are as follows. On May 2, 1974, Huff, pursuant to regulation, requested permission of the Commanding General, 1st Marine Aircraft Wing, to distribute for signature in his barracks a petition to Senator Alan Cranston regarding the use of members of the military and National Guard in labor disputes. (A. 7, 15, 27, 32.) Huff also requested permission to distribute off-base, outside the main gate of the Air Station, copies of

[2] All four regulations contain virtually the same language; all four are applicable to the Iwakuni Air Station.

a leaflet on the use of Article 138 of the Uniform Code of Military Justice. Huff stated that the distribution and petitioning would be accomplished while out of uniform and off-duty, would involve the use of no government materials, would not interfere with pedestrians or vehicular traffic, and would not interfere with the performance of duties of any military personnel. Huff's request covered the period from May 10 through May 14.

Thereafter, on May 20, 1974, General V.A. Armstrong, Commanding General, 1st Marine Aircraft Wing, denied both of Huff's requests of May 2. (A. 7, 28, 34-35.) General Armstrong's denial of permission to circulate the petition to Senator Cranston, stated as follows:

> "The petition which you desire to circulate contains gross misstatements and implications of law and fact as well as impugning by innuendo the motives and conduct of the Commander-in-Chief of the Armed Forces in the exercise of his constitutional responsibilities. To authorize permission to circulate such grossly erroneous and misleading commentary would be contrary to my responsibility as a commander to maintain good order and discipline and afford proper guidance to the men under my command. Accordingly, your request to circulate the petition as submitted is not approved." (A. 34-35.)

General Armstrong denied permission to distribute the leaflet because he considered the copyright release submitted to be insufficient evidence to demonstrate that the leaflet had in fact been released by the copyright holder. (A. 35.)

On or about May 8, 1974, pursuant to regulation,

Falatine submitted a letter to the Commanding General, 1st Marine Aircraft Wing, requesting permission to distribute for signatures a petition to Congressperson Ronald Dellums in support of universal and unconditional amnesty for Vietnam war resisters. (A. 8, 16-17, 38, 44-45.) Falatine asked permission to distribute the petition from May 15 to May 31 outside the post exchange and the enlisted men's club. In the alternative, he asked permission to circulate the petition on the street outside the main gate of the Air Station. He stated that the circulation of the petition would be accomplished while out of uniform and off-duty, would involve the use of no government materials, would not interfere with traffic, would not interfere with the performance of any military duties, and would not result in any involvement in Japanese political affairs.

On May 20, 1974, General Armstrong, Commanding General, 1st Marine Aircraft Wing, denied Falatine's request to circulate the petition. (A. 8, 39, 46-47.) The reasons given for the denial are exactly the same as the reasons given on that very same date to Huff for the denial of his petitioning request of May 2 (A. 34-35); in fact, with minor exception, General Armstrong used the exact same language in denying both Falatine's and Huff's requests. (Compare A. 34-35 with A. 46-47.)

Subsequently, on June 24, 1974, pursuant to regulation, Huff and Falatine separately requested permission from the Commanding General, 1st Marine Aircraft Wing, to distribute copies of a leaflet, entitled "We Hold These Truths To Be Self-Evident (But Do The Brass?)," containing the Declaration of Independence and the First Amendment to the Constitution, along with commentary. (A. 8, 18-20 29, 40, 48-49.) Huff

sought to distribute the leaflet outside the main gate of the Iwakuni Air Station, while off-duty and out of uniform. Falatine's request provided for distribution in front of the "Mini-Mart" and the enlisted men's club, on-base during off-duty hours while out of uniform, from July 4 to July 7 and July 25 to July 30. The distribution, Falatine's request stated, would constitute no interference with the performance of military duties, would involve the use of no government materials, would not result in the coercing of anyone to take or read copies of the leaflet, would be done in such a way to avoid interference with pedestrian and vehicular traffic, would not involve the posting of any literature announcing the distribution, would honor military courtesy, and would not in any way result in involvement in Japanese political affairs.

On July 1, 1974, General Armstrong, acting under the regulation, denied Falatine's request to distribute the leaflet on base. (A. 8-9, 40 50.) He stated in pertinent part:

> "The introductory paragraph is, by transparent implication, disrespectful and contemptuous of all of your superiors, officers, noncommissioned officers and civilians alike. As such, I consider that distribution of the flyer would present a clear hazard to the discipline and morale within the 1st Marine Aircraft Wing." (A. 50)

Despite General Armstrong's denial of Falatine's request and the reasons given, on that very same date, General Armstrong, acting under the identical regulation, approved Huff's request to distribute the very same leaflet off-base from July 2 through July 6. (A. 8-9, 29, 36-37.) No distinction was made by General Armstrong

between distribution of the leaflet on-base and distribution off-base which would in any way explain the approval of Huff's request and the denial of Falatine's request to distribute the same leaflet.[3]

Thereafter, on or about July 12, 1974, Huff, Falatine, and several other Marines while off-base, off-duty, and out of uniform, showed to fellow Marines a copy of a proposed letter to Senator J. William Fulbright, concerning United States support for the government of South Korea. (A. 9, 21-22 29 40.) They did not distribute copies of the letter or ask for signatures on it, but merely showed it to those interested Marines. Huff and Falatine were arrested by military police and charged under Article 92 of the UCMJ with violating the regulation by not seeking prior command approval. (A. 9, 30, 40.) Subsequently, Huff was convicted of two counts of violating the challenged regulations; he was sentenced to 60 days confinement at hard labor, forfeiture of half-pay and reduction in rank from E-3 to E-1, the lowest enlisted grade. (A. 9, 30.) However, the formal court martial proceedings against Falatine were dismissed, due to lack of evidence. (A. 9, 40.)

Gabrielson, on July 30, 1974, requested permission, pursuant to regulation, from the Commanding Officer, Marine Corps Air Station, Iwakuni, Japan, to distribute copies of the previously mentioned Fulbright letter as well as copies of a statement on the arrest of the five Marines for showing copies of the Fulbright to other

---

[3] In granting Huff permission to distribute the leaflet, General Armstrong emphasized that Huff was "to insure that the document that you distribute is *precisely* the document that you have requested permission to distribute." (A. 36.) [Emphasis in original.]

Marines without prior command approval. (A. 9, 21-24, 51, 54.) Gabrielson requested permission to distribute these materials during the month of August both off-base, near the main gate to the Air Station, and on-base, in the "B" barracks area. On August 6, 1974, Gabrielson received a response from Colonel E.S. Murphy, Commanding Officer of the Air Station, only partially granting his request. (A. 9, 52, 56-57.) Permission was given to distribute the Fulbright letter and the statement on the sidewalks adjacent to and at the entrances of the "B" barracks, but not in the barracks themselves. The Commanding Officer further restricted the distribution on-base by stating that "you will not engage in argument or debate of the issue presented in your material. . . . ." (A. 57) Permission was denied to distribute the materials outside the main gate, because such distribution constituted "a form of political activity within the host country and would be in violation of . . ." the Status of Forces Agreement between the United States and Japan. (A. 56.)

Respondents, herein, believing that their constitutional and statutory rights had been violated by the Navy and the Marines, brought suit in federal court after failing to find relief within the military. On May 21, 1976, the District Court issued an opinion granting in part and denying in part respondents' motion for summary judgment. *Huff v. Secretary of the Navy,* 413 F. Supp. 863 (D.D.C. 1976). Essentially, the Court found that the actions of the military in prohibiting or restricting the distribution of petitions and printed material on-base at Iwakuni violated the First Amendment to the Constitution and 10 U.S. Code §1034; the Court held that the regulations were unconstitutional as

applied to serviceman-to-serviceman distribution and/or petitioning on-base during off-hours and away from restricted or work areas and violated 10 U.S. Code §1034 as applied to petitioning. On May 27, 1976, an injunction was issued restraining the military from continuing to require prior approval for such protected activities.

Petitioners appealed that part of the judgment granting respondents relief. By decision of March 15, 1978, the Circuit Court affirmed the part of the judgment which found the military regulations in violation of 10 U.S. Code §1034 as applied to on-base petitioning activities. *Huff v. Secretary of the Navy,* 575 F.2d 907 (D.C. Cir. 1978). The government requested a rehearing, which was denied on May 15, 1978. Subsequently, on October 10, 1978, a petition for a writ of certiorari was filed with this Court; the petition was granted on March 19, 1978.

SUMMARY OF ARGUMENT

Navy and Marine regulations requiring prior command approval before any petition is originated, signed, distributed, or promulgated violate 10 U.S. Code §1034. That statute, as shown by its plain language and legislative history, guarantees to all members of the military the right to petition Congress, both individually and collectively, without prior restraint. This interpretation of the statute is strongly reinforced by the historical importance of the First Amendment right to petition the government for a redress of grievances. The facts in this case show that any other statutory inter-

pretation gives the military free reign to prohibit unquestionably legitimate petitioning activity.

The only relevant exception to 10 U.S. Code §1034 is "a regulation necessary to the security of the United States." As demonstrated clearly by the actions of the government, the system of prior restraint established by these regulations is not necessary to our nation's security. For over three years now an injunction has been in effect restraining the enforcement of these regulations as they pertain to petitioning activity; yet the government has not at any time requested any court for a stay of the injunction.

Greer v. Spock, 424 U.S. 828 (1976), does not require any different result since that case did not involve the right of service members to petition Congress under 10 U.S. Code §1034, but rather involved the question of the military's authority over civilians access to a basic training camp.

Accordingly, the military regulations are invalid under 10 U.S. Code §1034 to the extent that prior approval is required for petitioning activities between members of the military off-duty on-base away from restricted or work areas at a foreign duty station.

ARGUMENT

A. 10 U.S. Code §1034 Prohibits the Prior Restraint of Petitioning Activities.

Respondents, individually and as a class, were restricted in their petitioning activities by FMFO 5370.3, which states that Marine Corps personnel within the Pacific shall not:

> "*originate, sign, distribute, or promulgate petitions*, publications, including pamphlets, newspapers, magazines, handbills, flyers, or other printed or written material on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy, or in any military installation on duty or in uniform, or anywhere *within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained.*" [Emphasis added.]

Congress, however, has passed the following statute:

> "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." 10 U.S. Code §1034.

As found by the Court below, *Huff v. Secretary of the Navy*, 575 F.2d 907 (D.C. Cir. 1978), the Navy and Marine regulations under review are invalid under 10 U.S. Code §1034.

1. 10 U.S. Code §1034 applies to petitioning activities.

The statute, 10 U.S. Code §1034, prohibits any restriction in "communicating" with members of Congress unless "the communication" is unlawful or violates a regulation necessary to the country's security. Giving "communication" its ordinary meaning, *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Ernst & Ernst v. Hotchfelder*, 425 U.S. 185 (1976); *Columbia Water & Power Company v. Columbia Electric Street R.&P Company*, 172 U.S. 475 (1899), it is clear that petition-

ing is within the terms of the statute. For not only is petitioning, whether individually or collectively, an acceptable form of communication, but in the case of Congress, it is in fact a traditional form. The statute "does not by its terms distinguish among different kinds of communications." *Allen v. Monger*, 583 F.2d 438, 440 (9th Cir. 1978).[4]

The Department of Defense agrees that the statute encompasses petitioning. Section III G of Department of Defense Directive 1325.6, "Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces," reads in pertinent part as follows: "In addition, a member may *petition* or present any grievance to any member of Congress (10 U.S.C. 1034)." [Emphasis added.] Accordingly, there can be no question but that the statute protects petitioning activity.[5]

Although the government contends (Br. 37) that the statute is restricted to individuals, the language of the statute does not support this argument. The statute does not by its terms refer specifically to an individual member nor does it restrict "any member" from "communicating" only on an individual basis. As shown above, petitioning, as either an individual or collective activity, is certainly encompassed within the language of the statute. Further, there are no words in the statute which demonstrably restrict the meaning of the statute to individual action. Therefore, the government's contention that the statutory language restricts the protections of 10 U.S. Code §1034 to individuals acting alone cannot stand:

> "This Court pointed out in *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, that '"the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."'" *Chandler v. Roudebush, supra*, 425 U.S. at 848.

The legislative history of 10 U.S. Code §1034 admittedly shows that the impetus for the statute was the problem encountered by a sailor desiring to communicate with his Congressman, Mr. Byrnes of Wisconsin. 97 Cong. Rec. 3776 (1951). The sailor had been advised by his commanding officer that a direct communication with his congressman was prohibited; Navy policy required that the communication be sent through official channels. Mr. Byrnes stated: "I will admit, Mr. Chairman, that there is no restriction on their right to send communications through channels, that anybody knows that that certainly is a restriction in and of itself." 97 Cong. Rec. 3776 (1951).

The amendment initially offered by Mr. Byrnes read as follows:

"No person shall be inducted for training and

---

[4] A petition for a writ of certiorari is pending in this case *sub. nom. Brown v. Allen*, No. 78-1005, October Term, 1978.

[5] Despite the government's contention (Br. 37) that nothing in the regulations restrains individual communications with Congress, the government also recognizes (Br. 40-41 n. 21) that an individual's communication can be a "petition." The regulations require prior approval for the origination, signing, and distribution of any petition. Therefore, contrary to the government's argument, there is a direct conflict between the regulations and the statute. See also, *Huff v. Secretary of the Navy*, 575 F.2d at 917, n. 1 (Tamm, dissenting).

service under this title into any branch of the Armed Forces which restricts or limits the rights of its members to communicate directly with Members of Congress unless such communication is in violation of regulations necessary to the security and safety of the Armed Forces."

Subsequently, the proposed legislation was redrafted and offered in what became its final form. As adopted in 1951, it read as follows:

"No member of the Armed Forces shall be restricted or prevented from communicating directly or indirectly with any Member or Members of Congress concerning any subject unless such communication is in violation of law or in violation of regulations necessary to the security and safety of the United States."

The legislative history shows that it was the general intent of the Byrnes amendment to simplify communications with Congress and to eliminate military review of those communications. As stated by the Circuit Court below:

"The legislative history of §1034 confirms that Congress sought by this legislation to prohibit military commanders from interfering with communications to Members of Congress *in advance* of the actual sending of the communications. A system of prior restraint—as opposed, for instance, to the *post hoc* imposition of penalties for scurrilous, obscene, mendacious, or other improper communications—is precisely what Congress intended to prohibit, subject to the limited exceptions noted in the statute." *Huff v. Secretary of the Navy, supra*, 575 F.2d at 912. [Footnote omitted.]

Contrary to the implications of the government's

argument (Br. 37, 40), there is no restriction in the wording of the statute on collective petitioning activities. Nor, in any way, does the legislative history support a restriction on group petitioning activities. As found by the Court below *Huff v. Secretary of the Navy, supra*, 575 F.2d at 912:

"The Government contends, however, that the statute quoted above was intended to protect only letters by individuals to Members of Congress. We think the legislative history indeed leaves no doubt that the right to present a solitary, individual grievance to a Member of Congress is encompassed by §1034. *But there is no indication that this is the outer limit of the communication which Congress sought to protect in passing this legislation.*" [Footnotes omitted. Emphasis added.]

In reaching this conclusion, the Circuit Court quite correctly pointed out that a service member's solitary communication in many instances cannot as effectively accomplish what group petitioning activities or coordinated mailing campaigns could accomplish.

The Court of Appeals in *Allen v. Monger, supra*, 583 F.2d at 440-442, reached the same conclusion as the Court below regarding the scope of §1034. Relying upon the historical context, the Ninth Circuit found that the changes in the wording of the Byrnes amendment signified a broadening of Congressional purpose. As revised, and adopted, the Byrnes amendment prohibited restrictions on communicating "directly or indirectly" with any member or members of Congress concerning "any subject." These revisions, the Ninth Circuit found, enlarged the scope of the rights pro-

tected under the statute.[6]

Moreover, 10 U.S. Code §1034 must be interpreted, as pointed out by the Court below *Huff v. Secretary of the Navy, supra*, 575 F.2d at 913, in light of "the long and cherished tradition in this country, embodied in the first amendment ('. . . the right *of the people peaceably to assemble, and to petition Congress* for a redress of grievances'). . . ."[7] It is this "long and cherished tradition" which is completely disregarded by the government in its argument.

This Court on numerous occasions has recognized the First Amendment right to petition. *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Eastern Railroad Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *Bridges v. California*, 314 U.S. 252 (1941). As stated in *Eastern Railroad Conference v. Noerr Motor Freight, supra*, 365 U.S. at 137-138:

> "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. . . . The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress the intent to invade these freedoms."

[6] 10 U.S. Code §1034 was rewritten in 1956 as part of a recodification effort. Certain words were removed in that process as surplusage. It is clear from the congressional history that there was no intention to change the meaning of the statute. *Allen v. Monger, supra*, 583 F.2d at 441.

[7] See Brief for the Respondent at 8-15, *Brown v. Glines*, No. 78-1006, October Term, 1978.

In the same light, the decisions of this Court have long looked with strong disfavor upon any system of prior restraint. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Healey v. James*, 408 U.S. 169 (1972); *New York Times v. United States*, 403 U.S. 713 (1971); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Near v. Minnesota*, 283 U.S. 697 (1931). These decisions, as well, point towards an interpretation of 10 U.S. Code §1034 which does not limit its protection against prior restraint to the solitary individual letter, for a statute should be construed so as to avoid constitutional questions. *Eastern Railroad Conference v. Noerr Motor Freight, supra*, 365 U.S. at 138.

Further, the Department of Defense in two separate regulations recognizes the historical right to petition members of Congress. Section III G of DOD Directive 1325.6 reads in pertinent part as follows: "In addition, a member may petition or present any grievance to any member of Congress (10 U.S.C. §1034)." The DOD Directive 1344.10 states in Enclosure 1, paragraph 2.f., that a member on active duty may sign "a petition for specific legislative action or a petition to place a candidate's name on an official election ballot, provided the signing thereof does not obligate the member to engage in partisan political activity and is taken as a private citizen and not as a representative of the Armed Forces." In neither of these directives is any prior restraint imposed upon the right to petition.

From the wording of 10 U.S. Code §1034, its legislative history, and the importance of First Amendment values in our nation, it is clear that both individual and collective petitioning activity constitute communications to Congress protected by statute from prior restraint.

The application of the Navy and Marine regulations in the instant case clearly demonstrates the need for the protections of 10 U.S. Code §1034. The regulations require prior approval for originating, signing, distributing, and promulgating petitions. "Indeed, the requirement of command authorization is interposed at every stage of the petitioning process, from drafting the document to circulating it to signing it." *Huff v. Secretary of the Navy, supra*, 575 F.2d at 911. [Footnote omitted.] Because the individual respondents, as well as the class, are stationed at the Iwakuni Marine Corps Air Station, Japan, under the regulations it makes no difference whether the members are on-base or off-base, in uniform or out of uniform, on duty or off duty, or whether they solicit signatures from service persons or others; the regulation requires prior approval "anywhere within a foreign country irrespective of uniform or duty status." FMFO 5370.3.

A review of the facts in this case shows that the military uses the prior restraint regulations to prohibit proper petitions. Statements by the commanding officers denying approval of requests to circulate petitions and other materials amply demonstrate that the command's decisions were the result of, at best, disagreement with the substance of the petitions or the result of whim and caprice. In fact, the actions of the military officials were so insupportable that the government found itself forced to concede error with regard to all denial actions by the command. *Huff v. Secretary of the Navy, supra*, 575 F.2d at 909.[8] The facts here lead

[8]The petitions in this case did not involve the specific military mission at Iwakuni or any complaints about conditions there. The petitions were concerned with matters of general interest to citizens and members of the military. Given the facts here, one need not wonder what action the command would have taken, for example, on a request to circulate a petition to Congress complaining about racial discrimination on base.

one to conclude that the entire purpose of the regulations is to inhibit the circulation of petitions by requiring prior approval. And the District Court below so found: "It is clear to this Court from these undisputed facts that plaintiffs' requests were denied on the basis of the *content* of the petitions and leaflets, rather than legitimate military security requirements." *Huff v. Secretary of the Navy*, 413 F. Supp. 863, 868 (D.D.C. 1976).

The government, in its Petition for a Writ of Certiorari (Pet. 14), contended: 'The regulations at issue in this case strictly limit the grounds on which commanders can disapprove circulation of petition. It therefore can be expected that most petitions will be approved for circulation." And now in its brief, the government states (Br. 46): "A base commander will withhold approval of the distribution of petitions only where they present a 'clear danger' to military discipline, loyalty and order." But, as demonstrated by the facts in this case, the requests to circulate petitions were denied for reasons outside the language of the regulations. The one time the language of the regulations was employed, the commanding officer disapproved one respondent's request to distribute a leaflet as "a clear hazard to discipline and morale;" yet, on the very same date, that same commanding officer approved the distribution of that very same leaflet by another respondent! Thus, it is perfectly plain, as three courts of appeals have now held, that the right of military members to petition cannot be effectively exercised under regulations requiring prior command approval.[9]

[9]The system of prior restraint under review here contains no procedural safeguards of any kind. See *Freedman v. Maryland*, 380 U.S. 51 (1965); *Southeastern Promotions, Ltd. v. Conrad, supra.* The request to circulate a petition is made by a service-

(continued)

2. The regulations are not necessary to the security of the United States.

10 U.S. Code §1034 permits two exceptions: first, if a communication is "unlawful"; second, if a communication violates a "regulation necessary to the security of the United States." No contention has ever been made in this case that the communications involved are in any manner unlawful. The government does contend, however, that the regulations involved here are necessary to the security of the United States and therefore fit within the exception. (Br. 42).[10]

(footnote continued from preceeding page)
member to the commanding officer and it is either denied or approved *ex parte* by that commanding officer; there is no hearing of any nature or review of that command decision. *Compare Greer v. Spock*, 424 U.S. 828 (1976). The one "procedural" requirement of the regulation is that the servicemember must request approval at least 25 days prior to the petitioning activity! *See* MAWO 5370.1B(6)(e)/MCASO 5370.3B(6)(e).

[10]The otherwise necessary balancing between First Amendment freedoms and military necessity is not presented in this case. As stated by the Court below, *Huff v. Secretary of the Navy, supra*, 575 F.2d at 912:

> "In enacting this statute, Congress has eased the task of the courts in evaluating the validity of military restrictions on the right to petition. The statute not only indicates that free and unrestricted communication by members of the armed forces with the Congress or members thereof is of particular concern to the legislative branch, but also commands that such communication be subject to additional protection beyond that afforded other kinds of speech by the first amendment. Whatever standards may be held to apply generally to restrictions on petitioning and related activity cannot be less stringent than those provided in §1034. Thus, the statute represents a legislative evaluation of the competing interest in free expression of views to

(continued)

A review of the legislative history shows only one statement concerning the two exceptions to the basic protection of the statute. Mr. Vinson, in initially introducing the revised amendment, stated that the communication could be "on any subject if it does not violate the law or if it does not deal with some secret matter." 97 Cong. Rec. 3877 (1951). Quite clearly, the regulations under attack here do not limit themselves to protecting secret matters. The wording of the regulations and the broad sway given the command in exercising discretion, for the most part, cover areas well beyond the concept of security as it pertains to "some secret matter." Thus, if a strict literal interpretation of the statute and its legislative history are to prevail, the regulations are unquestionably invalid. In fact, at no point has the government even hinted that the purpose of the regulations is to protect secret matters.

The government rather argues that some prior restraint over on-base petitioning activities of service personnel is essential and that, therefore, the regulations under review are necessary to the security of our nation (Br. 42.) Indeed, the government contended in its Petition for a Writ of Certiorari (Pet. 10) that the decision below has worldwide effect for our national security. A reading of the government's argument makes one wonder how we have survived as a nation, given the fact that the injunction in this case was originally issued

(footnote continued from preceeding page)
members of Congress, on the one hand, and the special requirements of the military, on the other. The difficult balancing which would otherwise have to be accomplished by the judiciary has been legislatively resolved: restrictions imposed upon lawful communications to Congress must be 'necessary' to the national security."

by the District Court on May 27, 1976. That injunction, despite its supposed worldwide adverse effects, has been in existence for over three years and the government has never requested a stay from the District Court, from the Circuit Court, or from this Court.[11]

The only procedural requests the government has filed in this Court and below have been motions, numerous ones, for extensions of time. Although the judgement below was entered on March 15, 1978 (and the petition for rehearing and rehearing *en banc* was denied on May 15, 1978), the government requested an additional thirty days, beyond the ninety permitted by statute, for filing a writ of certiorari because additional time was needed to determine whether to file a petition in this case! Moreover, since no request for a stay has ever been made, there have been no presentations by the government at any stage of the proceedings which show that the respondents' activities or the court's injunction have actually interfered with the proper functioning of the military All this clearly demonstrates that there is no merit to the government's "national security" contentions.[12] [13] The freedom from

[11]The original injunction issued by the District Court was actually broader than the outstanding injunction resulting from the decision of the Court of Appeals, since it included within its scope the distribution of materials as well.

[12]The conclusory allegations found in the affidavit of a Marine general (Pet. App. G 58a-63a) did not impress the District Court or the Court of Appeals below The fact that at no stage has the government requested a stay of the injunction belies the allegations of the affidavit.

[13]Approximately four years ago, a similar injunction was issued in *Allen v. Monger*, 404 F. Supp. 1081 (N.D. Cal. 1975). Likewise, in that case, the government has made no request for a stay of the injunction at any stage. *See* Opposition to Petition for Certiorari at 3-4, *Brown v. Allen*, No. 78-1005, October Term, 1978.

prior restraint over petitioning activities "does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security." *Greer v. Spock*, 424 U.S. 828, 852 (1976) (Brennan, J., dissenting).

As found by the Court below:

> "We conclude that no showing has been made that a system of prior restraint of petitioning activities on the Iwakuni Air Station is necessary to the national security. Findings of the District Court with respect to the nature of the military mission at the base are not extensive, but it is clear that the station is not an actual and current combat zone." [Compare *Carlson v. Schlesinger*, 511 F.2d 1327 (D.C. Cir. 1975).] While an affidavit introduced in the Court below states that base is 'combat-ready,' there are no combat activities performed by base personnel during peace time. We understand that order and discipline might be more tightly maintained were commanders given the opportunity to screen petitions prior to their circulation, but we do not think that the national security can be said to require that the objective of military discipline be pursued at the exclusion of all other interests. If this were the case, then §1034 would be a nullity, for restrictions on petitioning activity, as on other types of speech, can always be said to decrease the possibility of lapses of military discipline. We agree with the District Court that as long as the on-base petitioning activity is performed away from restricted or work areas during off-duty hours, there should be no prior approval required for these activities because such approval is not 'necessary to the national security.'" *Huff v. Secretary*

of the Navy, supra, 575 F.2d at 914. [Footnote omitted.][14]

The striking down of the system of prior restraint will not leave the military helpless against service members who originate, sign, distribute, or promulgate petitions which are truly improper in their content. *Huff v. Secretary of the Navy, supra*, 575 F.2d at 912, 914. As shown by Enclosure 1 to DOD Directive 1325.6, under the heading "Constitutional and Statutory Provisions Relevant to Handling of Dissident and Protest Activities in the Armed Forces," there are five general criminal statutes and nine sections of the Uniform Code of Military Justice listed which can be employed by the military to impose penalties (and the threat of penalties) for improper communications. Indeed, two of the respondents in this case were arrested just outside the gate at the Iwakuni Air Station for distribution of a letter addressed to a member of Congress because they had not sought prior command approval. *See Parker v. Levy*, 417 U.S. 733 (1974).

Accordingly, as shown by the facts of this case, the challenged regulations imposing a system of prior restraint are not "necessary to the security of the United States."

B. Greer v. Spock Does Not Support the Validity of the Regulations.

Throughout the history of this case, the government has contended that this Court's decision in *Greer v.*

[14]"As did the District of Columbia Circuit in *Huff*, we hold that the Navy has failed to show that the national security required a system of prior restraints in these cases." *Allen v. Monger, supra*, 583 F.2d at 442.

Spock, 424 U.S. 828, requires reversal of the lower court's decisions. In *Greer v. Spock, supra*, this Court was faced with a question of the authority of the military to prohibit civilians from entering a basic training military reservation for purposes of making campaign speeches and to require prior approval before allowing the distribution or posting of partisan political campaign literature at that same base. Here, in contrast, respondents are members of the military itself seeking to circulate *petitions* among other members of the military on their own base (which is not a basic training camp) pursuant to their rights under 10 U.S. Code §1034. As stated by the Court below:

> "We find *Greer* neither controlling nor persuasive with respect to the issue of the validity of the regulations implementing a system of prior restraint on petitions at the Iwakuni Air Station. Most significantly, of course, the holding in *Greer* was constitutionally based. The *Greer* Court had no occasion to consider the validity of that prior restraint regulation under §1034 because petitions to Congress were not involved in *Greer*." *Huff v. Secretary of the Navy, supra*, 575 F.2d at 915.[15]

The Ninth Circuit subsequently agreed with this view:

> "*Greer v. Spock* . . . , which the government emphasizes, does not apply to the case. *Greer* rejected the First Amendment claims of uninvited civilians on a military reservation. The present case deals with military personnel claiming rights under a statute enacted for their benefit." *Allen v. Monger, supra*, 583 F.2d at 442.

[15]The respondents do not in any way concede that the voided regulations are constitutionally permissible. See *Huff v. Secretary of the Navy, supra*, 575 F.2d at 911, 915.

To the extent that the rationale in *Greer v. Spock, supra*, is based on the maintenance of "a politically neutral military establishment under civilian control," it would seem that 10 U.S. Code § 1034 was specifically designed to protect that tradition. Any system of prior restraint upon the right of petition protected under the statute would undermine that objective.

In addition, unlike the situation in *Greer v. Spock, supra*, there are no alterative avenues at Iwakuni in which political expression may be voiced, for the entire area comes under the system of prior restraint instituted by the challenged military regulations. Prior approval is required for the origination, signing, distribution, or promulgation of petitions "anywhere within a foreign country, irrespective of uniform or duty status." FMFO 5370.3. The District Court below found that

> "American servicemen stationed in a foreign country have even less access to information and ideas concerning domestic politics than the soldiers in boot camp who are free to attend rallies and receive information from civilian off-base sources. Therefore, the need to assure a free flow of information and ideas is crucial in the foreign base situation. . . . Establishing lines of communication among servicemen is especially important on bases in foreign countries which may have more restricted access to civilian sources of ideas than their counterparts in the States." *Huff v. Secretary of the Navy, supra*, 412 F. Supp at 867-69.

Accordingly, this Court's decision in *Greer v. Spock, supra*, contrary to the government's contentions (Br. 48), does not conflict with the decision of the Circuit Court below and does not require reversal of that ruling.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

ALAN DRANITZKE
DAVID ADDLESTONE
Attorneys for Respondents